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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 417.

REAL SILK HOSIERY MILLS, INC.,
Appellant,

AGAINST

CITY OF PORTLAND, GEORGE L. BAKER, MAYOR, FRANK S. GRANT, CITY ATTORNEY, *et al.*

BRIEF FOR APPELLANT.

Statement of the Case.

This case comes before this Court on an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit, which affirmed a decree of the District Court for the District of Oregon, dismissing the bill of complaint of the Real Silk Hosiery Mills, Inc., the appellant herein (Transcript, p. 9).

The case was commenced by the filing of a bill of complaint praying for an injunction restraining the City of Portland, Oregon, and its officials from enforcing against the appellant an ordinance of the City, passed May 16th, 1923, which requires the payment of a license fee and the filing of a bond by any person who goes from place to place in the City of Portland taking orders for goods for

future delivery and who receives payment or a deposit of money in advance. The basis of the complaint is that the ordinance, as applied to the appellant's business, constitutes a burden on interstate commerce; deprives the appellant of its property without due process of law; denies to the appellant the equal protection of the laws; and constitutes an unreasonable, prohibitory and exorbitant discrimination against the appellant and persons or companies following the same usual course of business (Transcript, pp. 1-8). The City of Portland, the appellee herein, moved to dismiss the bill of complaint upon the ground that it appeared upon its face that the appellant was not entitled to any relief and that the passage of the ordinance was a valid exercise of the lawful power of the Council of the City. (Transcript, p. 8.)

The District Court dismissed the bill of complaint and entered a decree on December 24th, 1923. An appeal was thereupon taken from this decree to the Circuit Court of Appeals for the Ninth Circuit, and, after a hearing, that Court affirmed the decree (*Real Silk Hosiery Mills, Inc.* vs. *City of Portland,* 297 Fed. 897). The opinion of the Circuit Court of Appeals appears at pages 14-22 of the Transcript of Record.

The question involved is whether the ordinance is valid as applied to the salesmen or solicitors of the appellant in the City of Portland who are engaged solely in taking orders for its goods which are manufactured in Indianapolis, Indiana, and shipped in interstate commerce from Indianapolis direct to the purchaser in the City of Portland in fulfillment of the orders obtained by its solicitors, who at the time of taking such orders receive a deposit of money as part payment in advance for the goods to be delivered.

The Ordinance.

"An Ordinance amending Ordinance No. 40468 by adding thereto an article to be known as Article XLV½ and amending Section 16 of Article LII of said Ordinance, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1: That Ordinance No. 40468 entitled, 'An Ordinance on the regulation of private business, including licenses, and declaring an emergency,' passed by the Council December 21, 1921, be and the same is hereby amended by adding thereto an article to be known as Article XLV½ reading as follows:

ARTICLE XLV½

Solicitors

Section 1. Definition. A solicitor within the meaning of this article is defined to be any person who goes from house to house or from place to place in the City of Portland, selling or taking orders for, or offering to sell or take orders for goods, wares or merchandise or any article for future delivery, or for services to be performed in the future, or for the making, manufacturing or repairing of any article or thing whatsoever for future delivery, provided, however, that this article shall apply only to solicitors who demand, accept or receive payment or deposit of money in advance of final delivery.

Section 2. License. It shall be unlawful for any person to act as a solicitor within the meaning and application of this article without first securing a license from the Bureau of Licenses so to do.

Section 3. Application.—Bond. Any person desiring a license to engage as a solicitor within the City of Portland, shall make application therefor to the Bureau of Licenses, on

forms to be provided, stating the name and address of the applicant, the name and address of the person, firm or corporation which he represents, and the kind of goods offered for sale, or the kind of services to be performed. Such application shall be accompanied by a bond in the penal sum of $500.00 executed by a surety company or by two responsible freeholders residing in the City of Portland (or in lieu thereof a cash bond of equal amount,) conditioned upon the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both. Such bond shall remain in full force and effect, and in case of a cash deposit, such deposit shall be retained by the City of Portland, for a period of ninety days after the expiration of any such license, unless sooner released by the Council.

Section 4. Orders. All orders taken by licensed solicitors shall be in writing in duplicate, stating the terms thereof and the amount paid in advance, and one copy shall be given to the purchaser.

Section 2. That Section 16 of Article LII of said Ordinance No. 40468 be and the same is hereby amended by adding in proper alphabetical order the following:

Solicitor.—One who demands, receives, or accepts payment or deposit in advance of final delivery:

Those on foot.....	Quarterly,	$12.50
	Monthly,	5.00
Those using a vehicle...	Quarterly,	$25.00
	Monthly,	10.00

Section 3. Inasmuch as this Ordinance is necessary for the immediate preservation of

the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council May 16, 1923.

Geo. L. Baker, Mayor of the City of Portland.

Attest: Geo. R. Funk, Auditor of the City of Portland. Com. Pier" (Transcript, pp. 3-5).

Ordinance No. 40468 enacted in December, 1921, to which the foregoing ordinance was added in May, 1923, is the general ordinance of the City of Portland relating to the regulation and licensing of numerous businesses and occupations (Transcript, p. 3).

Statement of Facts.

The appellant is a corporation organized under the laws of the State of Illinois and is engaged in the manufacture and sale of silk hosiery throughout the United States. Its mills are located at Indianapolis, Indiana, where all of its goods are manufactured, and from which place they are shipped, on orders previously received, direct to individual purchasers throughout the United States. It sells and delivers its goods direct to the consumer only. It does not sell or distribute them through commission merchants or through the retail stores (Transcript, fol. 3). To obtain orders for its goods and facilitate their direct purchase by individual purchasers throughout the United States, it employs representatives or solicitors in the various States who go from house to house in the various communities for

orders. At the time an order is taken by the solicitor an "order blank" is made out and signed in duplicate by the solicitor as the representative of the appellant, one of which is given to the purchaser. (See forms of order, Transcript, between pp. 2 and 3.)

At the time of and as a part of the transaction of giving the order, the purchaser is required to make a so-called "deposit", which constitutes a payment on account of the purchase price of the goods ordered, as is clearly shown by the order blank or contract (Transcript, fol. 4). The order blank contains the following provisions with respect to this deposit, the amount varying from fifty cents to three dollars according to the amount of the purchase:

> "The Mills require a deposit of $1.00 on each box listed below. Your hosiery will be mailed you by Parcel Post C. O. D. direct from the Post Office Branch in our Mills. PAY THE BALANCE TO THE POSTMAN.
>
> As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post C. O. D. basis, our representative cannot accept your order unless the deposit is paid.
>
> We do not accept full payment in advance. Do not pay more than printed deposit."

The order blank contains a statement of the exact amount of the purchase price of the goods ordered and the balance that will be due on such purchase price when the goods are delivered to the purchaser C. O. D.

The amount of this deposit or payment on account of the purchase price is fixed by the appellant at the amount which it pays its representative for obtaining the order. As a matter of business convenience the representative retains the amount of

this payment or deposit thereby obviating the necessity of remitting it to Indianapolis and the payment of his compensation by remittances from that city (Transcript, p. 2).

After the order is so obtained, the representative sends it to a local or district sales manager's office in the State, which forwards it to appellant's mills at Indianapolis. Upon receipt of the order at the mills the goods ordered are packed and shipped by parcel post C. O. D. direct to the purchaser at the address stated in the order blank. In all instances they are shipped by parcel post C. O. D. direct to the purchaser; in no instance do they go to the local or district manager or any other representative of the appellant. No commission is paid or allowed to any outside agency in connection with the sale. By this method of business the appellant is enabled to furnish its goods to consumers throughout the United States at a lower price than by consigning them to commission houses or selling them to retail merchants for sale by them to the public (Transcript, p. 2).

In the development of its business as so described, the appellant has established and maintains 245 district and local sales manager's offices in the various States of the United States, through which the orders obtained by its representatives are forwarded to its mills; it employs over 2,000 representatives soliciting orders and sales of its hosiery covering practically every city and town of importance in the United States; and it has been so successful that it is shipping more than 2,000,000 packages of its hosiery a year from its mills at Indianapolis, Indiana, in interstate commerce to individual purchasers, and is doing a business of more than $10,000,000 per annum (Transcript, p. 2).

At the time that the ordinance in question was passed the appellant had and still has twenty representatives or solicitors in the City of Portland who take orders for its hosiery in the manner above set forth, which are sent to the appellant's mills at Indianapolis where they are filled and shipment made to the individual purchasers, the goods being continually in transit from the time they leave the mills until delivered to the purchaser in the City of Portland by parcel post, at which time the balance of the purchase price is paid through the Post Office Department.

Specification of Errors.

1. The Court erred in affirming the decree of the District Court dismissing the appellant's bill of complaint;
2. The Court erred in not holding and decreeing that the business carried on by the appellant and its solicitors in the City of Portland constituted interstate commerce, and that the ordinance was a direct burden thereon and was therefore in violation of Section 8 of Article I of the Constitution of the United States;
3. The Court erred in holding and deciding that the ordinance was within the police power of the City of Portland and therefore valid;
4. The Court erred in not holding and decreeing that the ordinance denied to the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF OF ARGUMENT.

I.

Decisions of this Court have reduced within very narrow limits the questions raised by the record in this case.

The following propositions, which are stated in the language of the Court, must be deemed to be firmly established:

1. That "under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted" *Air-Way Electric Appliance Corporation* vs. *Day* (decided Oct. 20, 1924).

2. That "a tax on the sale of an article imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made".

Brown vs. *Maryland,* 12 Wheaton, 419, 444.

3. That "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce".

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 497.

4. That "to tax the sale of such goods, or the offer to sell them, before they are brought into the State * * * seems to us clearly a tax on interstate commerce itself".

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 497.

5. "That a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state, prior to their introduction therein, *Stockard* vs. *Morgan,* 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall* vs. *Cal.* 136 U. S. 104."

Texas Transport Co. vs. *New Orleans,* 264 U. S. 150, p. 152.

6. "If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states."

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 498.

7. That "there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a *direct burden* upon inter-

state commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." (Italics ours.)

Brennan vs. *Titusville*, 153 U. S. 289, p. 302.

8. That "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. *Los Angeles*, 195 U. S. 223, p. 236.

II.

The appellant's business which is affected by the ordinance is interstate commerce.

The business of the appellant which the ordinance in question affects consists of the obtaining of orders for its hosiery through its representatives or solicitors in the City of Portland from individual purchasers and the fulfillment of those orders, when received by it at its mills in Indianapolis, by the shipment of the hosiery from that place direct to

the purchasers in the City of Portland. The transaction is simply a sale and delivery in one State of goods manufactured in another State upon an order previously given and transmitted to the State in which the goods are manufactured, and is in all respects interstate commerce.

Robbins vs. *Shelby Taxing District,* 120 U. S. 489;

Brennan vs. *Titusville,* 153 U. S. 289.

It is clear that the interstate character of the transaction as a whole cannot be affected by the manner in which the order may be obtained or by the terms of payment for the goods ordered; and it is immaterial whether they are paid for wholly or partly in advance or on final delivery insofar as the character of the transaction is concerned. In either case the transaction is interstate commerce and the representative of the appellant obtaining the order is engaged in interstate commerce.

III.

The ordinance is a direct burden on interstate commerce and therefore invalid.

1. The ordinance makes it unlawful for any person to go from house to house or place to place in the City of Portland and take orders for goods, wares or merchandise for future delivery, who demands, accepts or receives payment or deposit of money in advance of final delivery, without first securing a license in the manner provided. It further provides that any person desiring such a license

shall, with his application, file a bond in the penal sum of $500, conditioned upon making final delivery of the goods ordered; and further provides that such person shall pay a license tax as follows:

"Those on foot.....	Quarterly	$12.50
	Monthly	5.00
Those using a vehicle..	Quarterly	$25.00
	Monthly	10.00"

This ordinance is an attempt to regulate the appellant's solicitors who are engaged solely in interstate commerce and must be regarded therefore as a regulation of such commerce and a direct burden thereon.

This Court has consistently adhered to the doctrine that any regulation or tax imposed on the occupation of a solicitor taking orders in a State for a non-resident principal is a regulation of and direct burden on the interstate transaction involved and is therefore void.

Robbins vs. *Shelby Taxing District*, 120 U. S. 489, was the first of the so-called "solicitor or drummer cases". The Court held in that case that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce", and is not therefore subject to a license tax or other regulation by the local authorities. In *Brennan* vs. *Titusville*, 153 U. S. 289, the same principle was laid down by this Court; and these cases have been consistently adhered to and followed by this Court in its decisions relating to the validity of license and occupation taxes in any way seeking to regulate the business of solicitors representing non-resident principals; meaning by a non-resident principal one who manufactures and ships

the goods ordered in and from another State than that where the solicitor obtains the orders.

Stockard vs. *Morgan*, 185 U. S. 27;
Caldwell vs. *North Carolina*, 187 U. S. 622;
Rearick vs. *Pennsylvania*, 203 U. S. 507;
Crenshaw vs. *Arkansas*, 227 U. S. 389;
Stewart vs. *Michigan*, 232 U. S. 665;
Browning vs. *Waycross*, 233 U. S. 16;
Texas Transport Co. vs. *New Orleans*, 264 U. S. 150;
Bowman vs. *Chicago & North Western Ry. Co.*, 125 U. S. 465;
Stoutenburgh vs. *Hennick*, 129 U. S. 141;
Sioux Remedy Co. vs. *Cope*, 235 U. S. 197.

In *Brennan* vs. *Titusville* (*supra*), a city ordinance provided "that all persons canvassing or soliciting within said city orders for goods * * * or merchandise of any kind * * * shall be required to procure from the Mayor a license to transact said business", and imposed a license fee. The ordinance was held void as to a solicitor of orders for shipment in interstate commerce. The Court said:

> "Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled

that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown* vs. *Maryland*, 12 Wheat. 419, 444, in which a state law requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution, Chief Justice Marshall said:

> 'But should it be proved that a duty on the article itself would be repugnant to the Constitution it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself, * * * So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made.'
>
> * * * * *

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is

> a direct charge and burden upon that business; and if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

In *Crenshaw* vs. *Arkansas* (*supra*) the question of the power of a state to impose a license tax on the business of soliciting was again before the Court. The Supreme Court of Arkansas had upheld the ordinance "because of the distinguishing feature of the ordinance as a valid exercise of the police power of the State". In reversing the judgment of the Arkansas Court, this Court said (p. 399):

> "Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the state make it lawful. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 473, this Court said that 'the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.' "

In the same case, at page 396, in referring to the case of *Robbins* vs. *Shelby County Taxing District*, the Court said:

> "In that case, while this court recognized the power of the State to pass inspection laws to secure the due quality and measure of products and commodities and laws to regulate or restrict the sale of articles deemed injurious

to the health or morals, the principle was laid down (p. 497) that 'the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce', and it was held beyond the power of the State to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision."

In *Rearick* vs. *Pennsylvania* (*supra*) an Ohio corporation employed an agent to solicit retail orders for groceries in Sunburg, Pa. The agent sent the orders to the company in Ohio which filled them and sent the groceries by railroad to its agent in Pennsylvania who delivered them to the respective purchasers and collected the cash for them. The agent then sent the money to the corporation in Ohio. The agent was convicted for violating an ordinance of Sunburg which made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by travelling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license, for which a fee was required. The Court held that the agent was engaged in interstate commerce and that the ordinance constituted a direct burden on such commerce and was void.

This Court discussed the question involved herein in the recent case of *Texas Transport & Terminal Co.* vs. *New Orleans,* 264 U. S. 150.

In that case the defendant was employed as a soliciting agent for four steamship lines, its compensation being fixed on the amount of freight charges collected by it for each of the four companies which it represented. The City of New Orleans

levied a license tax of $400 a year upon the defendant, which tax was upheld by the Supreme Court of Louisiana.

This Court in reversing the decision of the State Court said:

> "This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is: that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall* v. *California*, 136 U. S. 104."

2. The ruling of these cases is conclusive in this case. The principle they lay down and apply covers all solicitors who obtain orders for interstate sales without regard to differences in the specific terms of the orders. The ordinance in this case concerns only solicitors who collect any portion of the purchase price payable in advance. But the fact that a solicitor collects a portion of the purchase price in advance at the time an order is given in accordance with the terms of the order does not change his status or function with respect to the interstate sale in connection with which his service has been rendered, or the interstate character of the sale. Whether an ordinance is a direct or incidental burden on interstate sales is not determinable by how the purchase price is payable.

It is just as direct a burden on interstate commerce to require a solicitor to secure a license and pay a tax therefor because he collects a portion of the purchase price, as it is to require a solicitor to secure a license who takes orders in connection with interstate sales where the goods are not paid for until final delivery. The burden on interstate commerce is distinctly a direct burden in both cases. This seems to us an unanswerable proposition, and it avoids the inconsistency of treating the requirement of a license as a direct burden on interstate sales when the whole purchase price is payable on delivery and as an indirect burden when a part of the purchase price is payable at the time the order is given, though they are equally lawful and legitimate modes of payment.

IV.

Treating the ordinance as an attempted exercise of the police power, it is not only void as imposing a direct burden on interstate commerce, but because it is unreasonable, arbitrary and unnecessarily burdensome.

The feature that is emphasized in all instances in which the exercise of the police power has been sustained in cases involving interstate transactions is that interestate commerce was only indirectly or incidentally affected thereby; and in no case has the exercise of the police power been upheld where it imposed a direct burden on interstate commerce. It was upon this theory that the "Blue Sky Law"

of Ohio was upheld as a valid exercise of the police power in the case of *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, referred to in the opinion of the court below; this Court holding in that case as to the securities involved, being securities brought into the State of Ohio for sale there, that "their interstate character is only incidentally affected by the statute" (p. 559).

So in the case of *Plumley* v. *Massachusetts*, 155 U. S. 461, this Court, in upholding the Massachusetts statute on the theory that it was within the power of the State to exclude from its markets and prevent the sale of articles which by reason of coloration or adulteration cheat the public into purchasing what they may not intend to buy, stated as follows (p. 472):

> "Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.' "

This limitation on the exercise of the police power is clearly stated in *Adams Express Co.* v. *New York*, 232 U. S. 14, in which the Court said, in considering a license tax regulating the business of expressmen, as follows (p. 31):

> "It is insisted that, under the authority of the State, the ordinances were adopted in the

exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. (Cases cited.) It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. (Cases cited.) As was said by this Court in *Crutcher* v. *Kentucky,* 141 U. S. p. 58, 'a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it'."

If the effect of an ordinance is to impose a direct burden on interstate commerce, it cannot be sustained on any theory or pretext as a valid exercise of the police power. This we contend is the situation in this case, as shown in the last preceding point. But, in view of the fact that it is urged that the ordinance is warranted as an exercise of the police power to prevent frauds, notwithstanding the conclusiveness of the principle there discussed, we submit that, were it not so concluded and therefore an open question, the ordinance is unreasonable, arbitrary and imposes an unnecessary burden on interstate business like the appellant's.

In this connection, we call attention to the declarations in the emergency clause of the ordinance, which is Section 3, as follows:

> "Section 3. Inasmuch as this Ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council" (Transcript, fol. 11).

This Section refers to "the public health, peace and safety" of the City of Portland. This is followed by a statement that "in the past frauds have been perpetrated upon the public by certain solicitors". Reading this in connection with Section 1, which defines the particular class of solicitors to which the ordinance applies, it may be assumed that the so-called frauds which are declared to have been perpetrated in the past and which the ordinance seeks to prevent in the future are frauds by solicitors who receive a payment in advance at the time of taking presumably fictitious orders for goods for future delivery.

Apparently any person desiring a license to engage as a solicitor within the City of Portland is entitled under the ordinance to obtain a license upon making an application on the form provided accompanied by the required bond; and the only penalty provided is for a failure to take out a license before acting as a solicitor as defined in the ordinance.

It is obvious that the direct and effective way to attack and suppress such frauds is by criminal

prosecutions. Instead of relying upon that method, however, the City of Portland resorts to the indirect method of licensing and bonding all solicitors who receive a payment in advance. But this does not really prevent or tend to prevent fraudulent acts or schemes by persons who may pretend to act as solicitors, or in any way regulate or curtail their activities. Dishonest persons with schemes to defraud the public will not take out licenses and give bonds, and will only be deterred from engaging in fraudulent practices by criminal prosecutions. The ordinance will not prevent such persons from carrying on their activities in the City of Portland, and it will accomplish little else than to harass legitimate business and those engaged in it. There is certainly no inducement for solicitors engaged in legitimate business and taking orders for the goods of manufacturers in other states to commit any frauds or practice any dishonesty through the collection of a small part of the purchase price in advance or otherwise. What possible inducement could there be for the solicitors representing such a concern as the appellant, which is conducting a large and profitable business throughout the United States, to perpetrate any frauds or in any way impose on the people of the City of Portland? The appellant's solicitors have steady employment at a rate of compensation that is presumably satisfactory to them. They carry with them printed order forms and when they obtain an order and take a deposit a receipt therefor is noted on the copy of the order blank and left with the purchaser; and this constitutes a binding obligation on the appellant to make delivery of the goods specified in the order. The purchaser thus has in his possession evidence of his payment on

account of the purchase price and a definite contract calling for the delivery of the goods upon the payment of the balance thereof, and is entitled to demand performance. There is no conceivable inducement in this transaction for the appellant's solicitors not to turn in orders obtained by them. They would gain nothing by not turning in an order as they have received their compensation for obtaining the order, and they would unquestionably lose their employment in case a customer had to apply directly to the appellant's mills for his goods. To assume, therefore, as the court below did, that the appellant's solicitors would be tempted in many cases not to turn in orders taken by them is to assume that with nothing whatever to gain they would deliberately expose themselves to discharge from their employment.

It is to be noted that the court below treated the reference in the ordinance to "certain solicitors" who were declared to have perpetrated frauds upon the public as specifically applying to the solicitors of the appellant, though there is no such intimation in the ordinance itself; and the court apparently assumed, without any proof, that the appellant's solicitors had in fact failed in many cases to turn in orders received by them, "in the absence of affidavits to the contrary" (Transcript, fol. 51). This case came before the court on a motion to dismiss the appellant's complaint, and the only facts before the court in connection with the doing of the appellant's business were those set forth therein. There was no reason or occasion for appellant to allege in its complaint that its solicitors had not failed to turn in orders taken by them and had not appropriated advance payments; and there was no necessity for the filing of any affidavits to that effect on such a motion as the first suggestion of

anything of the kind appears in the opinion of the Circuit Court of Appeals.

This Court is not bound by the recitals in the ordinance or its declared purpose.

In *Mugler* v. *Kansas*, 123 U. S. 623, this court stated, p. 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under the solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In *Dobbins* v. *City of Los Angeles*, 195 U. S. 223, the Court said, after referring to the presumption in favor of the lawfulness of the exercise of a municipal power as follows, page 236:

> "But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton* v. *Steele*, 152 U. S. 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:
>
> 'To justify the State in thus interposing its authority in behalf of the public, it must

> appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

Referring particularly to interstate commerce it was said in *La Coste* v. *Dept. of Conservation,* 263 U. S. 545, at page 550:

> "This Court will determine for itself what is the necessary operation and effect of the State law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of a state will not necessarily control. Regard must be had to the substance of the measure rather than its form. (Cases cited.)"

While it is clear that the ordinance will not prevent frauds of the character referred to as dishonest persons who pose as solicitors will not take out licenses, it seeks to provide a remedy for purchasers who may not receive goods ordered by requiring the filing of a bond by licensed and presumably honest solicitors. Why should such a burden be put upon the honest solicitor who is in no way responsible for the non-delivery of the goods or the return of the advance payment? Why should he by the coercion of the law be in effect made a

guarantor of transactions in which he is only acting as an agent? Assuming that to preserve his organization the manufacturer will have to provide the bonds, that is in effect requiring him by the same coercion to furnish a bond in case of every solicitor supplementing his liability under his contracts with purchasers. Is not that, in the case of both solicitor and manufacturer, an extraordinary, arbitrary and unreasonable requirement, and an unreasonable interference with the usual methods of trade; the only justification for which that can be urged being that there may be frauds perpetrated by dishonest manufacturers or solicitors? The only clear, positive effect of the ordinance is that it will embarrass legitimate trade by stopping it or curtailing the localities in which it is carried on, or burdening it with a mass of licenses and bonds at a very considerable expense which ultimately falls upon the consumer, and this with no substantial benefit in preventing frauds or in any other direction, with the exception of the benefit to commission houses and retail merchants in the various localities who may be thereby relieved from the competition of lower prices. Obviously the legitimate business which will suffer the most from the exactions of such an ordinance is interstate business, as it is the business in which solicitors are necessary and in which they are mainly employed. We maintain that the ordinance is arbitrary, unreasonable and unnecessarily burdensome, because it is a positive and serious interference with the usual methods of trade with only an infinitesimal possibility of realizing its declared purpose. In other words there is no reasonably assured relation between the operation of the ordinance and the evil assigned for its adoption.

If the City of Portland can require one form of bond, and $50.00 annually, (or $100. if using a vehicle), as a license fee, every city, town and village in the State of Oregon and in all other States, can impose similar requirements. The possibility of thousands of such requirements, varying in details, ~~by the various municipal corporations throughout the United States, would seriously and in details~~, by the various municipalities throughout the United States, would seriously and injuriously hamper, for instance, the appellant and others similarly situated in carrying on their interstate business in a reasonable and safe manner. Indeed many townships and villages would not afford sufficient business to justify them in going to the expense and trouble of paying a license tax and furnishing a bond; and this would necessarily operate as a limitation of their activities. It seems fair to say that these conditions and their consequences will be productive of more harmful results to the public than the alleged evils sought to be reached by the ordinance in question and, following its example, similar ordinances elsewhere. The constant increase in the cost of living, and especially in the purchase price of manufactured articles distributed through middlemen or retailers, emphasizes the importance of keeping free the channels of commerce to the end that manufacturers may deal directly with the public.

Moreover, if there be any real necessity for the regulation of solicitors selling the goods of a non-resident principal it is for Congress, and not for the various States or municipalities, to pass appropriate laws for such regulation, to the end that there may be uniformity of regulation all over the country.

In *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, the Court commented on the statute there involved imposing a license tax on canvassers as follows, page 498:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactment of forty different states."

In *Stoutenburgh* vs. *Hennick,* 129 U. S. 141, the Court, in considering a local license tax on solicitors, said at page 148:

> "That in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems; and that a State statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another State to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitely assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *Cooley* v. *Board of Wardens,* 12 How. 299; *Gilman* v. *Philadelphia,* 3 Wall. 713. It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the ex-

ercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality."

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, the Court, in considering a statute which required all purchasers of grain to take out licenses, said at page 58:

"It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it.

* * * * *

It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

Bowman v. *Chicago & North Western Railway Co.*, 125 U. S. 465;

American Express Co. v. *Iowa*, 196 U. S. 133;

Railroad Co. v. *Husen*, 95 U. S. 465.

V.

The theory of the opinion of the Circuit Court of Appeals as to the local character of the service of the appellant's solicitors is untenable.

1. To avoid the long line of the so-called drummer cases decided by this Court, a theory is evolved by the lower court which severs each transaction of sale into two separate and independent parts; one a transaction between the solicitor and the purchaser in which the order is taken and the compensation of the solicitor is paid by the purchaser; and the other a transaction between the appellant and the purchaser consisting of the sending and delivery of the goods and the payment of the balance of the purchase price. The first transaction is treated as a separate local service performed entirely within the State and distinct from the interstate transaction between the appellant and the purchaser. In reaching this conclusion the Court said:

> "Plaintiff is not a solicitor but a producer and a shipper. It does not go from house to house, and from place to place, taking orders for the sale of goods for future delivery. It is true that the plaintiff alleges that it employs solicitors to go out and solicit orders for its hosiery, and when such orders are received, they are accompanied by a small cash payment advanced by the purchaser, differing in amount according to the character, quality, and quantity of the hosiery ordered. But it is further alleged that the deposit made by the purchaser is retained by the solicitor as payment for his services in full, and is his sole compensation.

In other words, each sale is a separate and distinct service for which the solicitor is paid in full by the purchaser, and is the solicitor's sole compensation for that service. He receives nothing from the plaintiff and has no interest in the unpaid balance, and on the other hand the plaintiff has no interest in the advance payment made by the purchaser to the solicitor. Its interest is in the prospective profits in shipping goods for the unpaid balance, to be collected not by the solicitor, but by parcel post upon the shipment direct to the purchaser C. O. D.

Between the solicitor and this unpaid balance due the plaintiff upon delivery of the goods ordered is the district sales manager, whose relation to the plaintiff is not disclosed, but presumably he is plaintiff's agent in the particular locality. It follows that the solicitor's connection with the particular transaction terminates when he has turned in the purchaser's order to the district sales manager. The district sales manager forwards the order to the plaintiff, but no license tax or bond is required for that business or for the subsequent shipment. That shipment and the business of plaintiff to which it relates is left entirely free from taxes or other regulation by the State and by the City of Portland.

Can it be said, upon this state of facts, that the plaintiff's business in interstate commerce is subject to a burden because its independent solicitor, doing business in the City of Portland, as a solicitor, is required to pay a license tax and give a bond conditioned with respect to the faithful discharge of his obligations in carrying on that business?" (Transcript, pp. 17-18).

This is a clear misconception of the real transaction. The solicitors are employed by the appellant. Their function is to solicit orders on behalf of the appellant, and when obtained to reduce them to

writing, sign them and receive the deposit on behalf of the appellant. The orders are transmitted to the appellant through a district sales manager's office located in the City of Portland. This is the indispensable initial step in the transaction.

The total purchase price is stated in the formal order. It is the sum which the purchaser is obligated to pay to the appellant for the goods. A payment of a part of the purchase price is required in advance and is paid to the solicitor, not as money due from the purchaser to the solicitor, but as part of the purchase price of the goods. The payment required is retained by the solicitor under his arrangement with the appellant as compensation for his service rendered to the appellant. That he retains it instead of remitting it to his principal does not affect the purchaser. The solicitor's part in the sale is concluded when he receives the order and advance payment and sends the order to the district sales manager just as any travelling salesman's function in connection with a sale is performed when he has obtained an order and forwarded it to his principal. There is obviously no basis in the actual facts for the statements in the opinion of the Court below that the solicitor "receives nothing from the plaintiff", and "that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor", or for the description of the solicitor as "independent", and his business as "independent and self sustaining"; or for severing the solicitor's service from each transaction of sale as an entirety and treating it as a separate and independent transaction between the purchaser and the solicitor.

The business reasons for the advance payment and its retention by the solicitor are not far to

seek. The advance payment is necessary as an inducement to the purchaser to take the goods when delivered and pay the balance of the purchase price; and in case of their rejection by the purchaser owing to a change of mind or any similar cause, to recoup the appellant for the selection and packing of the goods and the expense of forwarding them and having them returned. Without that protection the manufacturer would be at the mercy of the purchaser who declines to receive the goods he has ordered. A small advance payment at any rate saves him from actual loss; and no doubt experience has shown that it materially tends to hold the purchaser to his order. One who has paid in advance $1.00 on a $6.00 order, or $2.00 on a $12 order, or $3.00 on a $16 order is not likely to forfeit what has been paid for a whim or mere change of mind. For this reason the advance payment is indispensable. This the court below failed to appreciate when it said that the advance payment was required to compensate the solicitor indirectly and that all the appellant had to do to escape the license and bond was to cease requiring it (T. p. 21). But such a change would be the elimination of a vital factor in the appellant's business.

Facing the problem of the payment of the compensation of thousands of solicitors all over the country and an advance payment being indispensable, the natural solution of it was to fix the payment at a sum equivalent to a workable compensation to the solicitor in connection with each order and allow him to retain it, thereby saving an open account with each solicitor and remittances from him and to him. That is the rationale of the appellant's method of business in respect of the advance payment and the payment of the solicitor's compensation out of

the purchase price. It is a natural and legitimate method of business and its operation in no way converts the purely interstate sales of the business into a combination of an interstate element, consisting of the receipt of the order, the transmission of the goods by mail C. O. D. as to the balance of the purchase price, and their delivery to the purchaser on payment of such balance, and of an intrastate element consising of the obtaining of the order by the solicitor, the forwarding of it to the district manager's office for transmission to the mills, and his retention of the advance payment on the purchase price of the goods collected by him. In each instance there is simply an interstate sale beginning with the obtaining by the appellant's agent of an order with the payment of a portion of the purchase price in advance, followed by its transmission to the mills and the transmission of the goods from the mill by mail direct to the purchaser, the balance of the purchase price to be paid on delivery. The advance payment does not change the character of such an interstate sale, nor does the fact that the appellant's agent is authorized by it to retain the amount paid as his compensation for his services in obtaining the order.

2. With this correction of the facts assumed by the court below as the basis of its ruling that the solicitor's function is a separate and distinct local, intrastate service, it would not seem necessary to discuss the cases cited in support of this particular ruling—*Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21; *Coe* v. *Erroll,* 116 U. S. 517. There is no similarity or analogy between the distinctly separate services involved in that case, that is, the train service for the transportation of passengers and the cab service maintained by the Pennsylvania Rail-

way Company for the local transportation of passengers after reaching the station, and the different steps in an interstate sale from the initial obtaining of the order by the manufacturer's solicitor or agent and the delivery of the goods under the circumstances disclosed by this case. The other cases cited by the court below—*Hall* v. *Geiger-Jones Company*, 242 U. S. 539, and *Plumley* v. *Massachusetts*, 155 U. S. 461—have been referred to in the preceding point, where it is shown that they have no application to such a case as this, in which the burden on interstate commerce imposed by the ordinance is direct and not merely incidental and indirect as in the two cases cited.

VI.

To single out solicitors who collect any portion of the purchase price in advance of final delivery and subject them to discriminating and hostile legislation is a violation of the equality clause of the Fourteenth Amendment.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, at page 560, this court approved the following statement made in a previous case:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the Equality Clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Embezzlement or misappropriation is not a natural consequence of the receipt of the money of another, and the mere possibility of embezzlement or misappropriation is not a reasonable ground for a classification of solicitors.

VII.

The decree of the Circuit Court of Appeals should be reversed and the ordinance held to be invalid.

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